Supreme Court, U.S.
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No. 98-1894

In The

Supreme Court of the United States

PEGGY ANN BUCKLEY,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

REPLY BRIEF

MICHAEL M. BERGER*
BERGER & NORTON
A LAW CORPORATION
1620 26th Street
Suite 200 South
Santa Monica, CA 90404-4040
(310) 449-1000

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

No matter how vociferously the California Coastal Commission asserts that it only claimed jurisdiction over the rear of the Buckleys' lot, and therefore they were always free to build on the front part, the "STOP WORK" orders that the Commission repeatedly posted on the property tell the true – and very contrary – story. Each order (reproduced in the Appendix) states:

"STOP WORK STOP WORK STOP WORK STOP WORK

* * *

> "You are hereby notified to stop *all* unpermitted work. No grading or construction or landfill is permitted *on this property*. A *Coastal Permit* has not been issued for this project." (App., pp. 67, 68, 70, 71; underscore in original; italics added.)

The "Property Location" to which these orders applied was identified as "6815 Dume Drive" (App., pp. 67, 68, 70, 71) – not part of it, or half of it, but the property at that address, i.e., the entire lot owned by Mr. and Mrs. Buckley. The Commission's persistent attempt to deny this central fact colors its entire brief,[1] and renders its analysis of little utility. The Buckleys in fact *had* all the permits they needed. They got them from Los Angeles County, the only entity with the jurisdiction to issue them. They did not need a "Coastal Permit" from the Commission for anything. As each of the courts below plainly held, the Commission simply had no jurisdiction over any part of this property. And yet it insisted

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[1] See, for example, the Commission's assertion that it "acknowledged it had no jurisdiction" over the front half of the lot (Br. in Opp., p. 6), a statement that is bluntly belied by the Commission's own "STOP WORK" orders that forbade "all" work on "this property" for which no coastal permit had been issued by the Commission, to say nothing of the Commission's defiant assertion to the trial court that it would continue asserting its supposed "jurisdiction" throughout the appellate process (App., p. 50).

that it could order all work on "this property" to cease, and it enforced its will by threatening the Buckleys and their contractor with a $10,000 fine that would increase by another $5,000 *every day*. Those "STOP WORK" orders prevented all use (as the contractor understandably fled when each was posted), and thereby took the Buckleys' property.

In addition to this crucial factual gaffe, the Commission seeks to divert attention from the central legal issues by asserting that Mrs. Buckley is merely seeking to reargue *Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006, *cert. den.*, 119 S.Ct. 179 (1998), rather than her own case. Not so. The case at bench was decided, as the Court of Appeal put it, "for better or for worse" (App., p. 30), under the compulsion of *Landgate*. It was not, as the Commission innocently asserts, "ancillary" to the decision. (Br. in Opp., p. 9.) To discuss this case, one has no choice but to discuss *Landgate*.

And there's the rub. *Landgate*, and perforce the case at bench that applies it, amounts to nothing less than defiance of this Court's holding in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). As quoted in the Petition, pp. 15-16, *First English* plainly decided that, where there is a regulatory taking of property, *the period of the taking encompasses the time consumed in litigation establishing that a taking occurred*. More than that, *First English* **reversed** California's contrary rule. (482 U.S. at 317.) But *Landgate* **reinstated** the California rule this Court explicitly struck down in *First English*, and the Court of Appeal applied it below.

This case, of course, adds the ugly wrinkle that the "regulatory" acts of the Commission were never legitimate regulation at all, but overreaching efforts of a government agency seeking to impose its will by a raw exercise of power – without jurisdiction – on citizens doing no more than trying to put their property to the perfectly lawful use of building their family home.[2] And they had to be knowingly

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[2] This is no advocate's hyperbole; the Commission has a track record. For a horrible example of its similar excesses, see *Healing v. California*

overreaching, even though the Commission persists here in disingenuously flogging its theory that it was authorized to retain jurisdiction over *part* of a lot if it was "environmentally sensitive." (Br. in Opp., p. 2.) The statutes are in the Appendix, at pp. 73-76. Ten times in the space of the two statutes the Legislature used the word "lot" in describing what was exempted from Commission jurisdiction. The Commission's careful lawyers and skilled staff could not have missed that. Moreover, when the County followed the statutes and declared the Buckleys' lot exempt, it referred to the "6815 Dume Drive lot" (App., p. 65), not a part of it. The Commission's insistence that it had a "legitimate dispute" with the Buckleys about its regulatory jurisdiction and was therefore making a "legitimate use of the judicial process" to resolve it (Br. in Opp., p. 8) is eyewash, and nothing more. Whatever the Commission did, the use of the term "legitimate" to describe it does violence to the English language.

I

THERE REALLY IS A PROBLEM WITH CALIFORNIA'S LAND USE JURISPRUDENCE. THE COASTAL COMMISSION, AS ONE OF ITS PRIME BENEFICIARIES, SIMPLY DOESN'T WANT TO ACKNOWLEDGE THAT IT EXISTS OR THAT NUMEROUS SCHOLARS AND JUDGES HAVE CALLED FOR CORRECTIVE ACTION

In the Petition, Mrs. Buckley presented ***not*** merely her (or her lawyers') views of California law. Rather, she collected for this Court the views of 20 nationally recognized

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Coastal Commn., 22 Cal.App.4th (1994) (property owner trying to build a home for his family got from the Commission what the court aptly characterized as "a long-term nightmare" [*Id.* at 1162]). It is worth noting that the Commission called the Healings' 17-year regulatory nightmare a "normal" delay in the planning process (*Id.* at 1171, fn. 7). Although Mr. Healing received some relief in that case, its limited precedential value has become nil after *Landgate*, which gutted the enforceability of such landowner rights as may have existed at the time.

authorities in the land use field – from all points of the scholarly spectrum, including some who bill themselves as "police power hawks" and openly favor strong governmental regulation of property. They all agreed that California's harsh treatment of property owners has become intense to the point of inspiring black humor among practitioners elsewhere in the country. (Pet., pp. 6-10, 18.) Mrs. Buckley also presented the analysis of three members of the California Supreme Court who have refused to go along with the intellectual rebellion by that court's bare majority that refuses to follow this Court's decisions on prime issues of federal constitutional law. (Pet., pp. 12-15, 18.)

The Commission's response is not analysis, but epithet. It calls Mrs. Buckley's presentation "a diatribe setting forth the petitioner's opinion of regulatory takings law in California" (Br. in Opp., p. 4), without deigning to mention any of the scholars or any of the Supreme Court Justices whose critiques and explanations of California practice were summarized in the Petition.

If there were any rational way to dispatch that collected wisdom, wouldn't the Commission have presented it? If any responsible voice disagreed, wouldn't the Commission have told the Court? But no. No citations; no defense; and no justice for property owners in California. That is why California's property owners need this Court's intervention. As aptly summarized in the Table of Contents of the *amicus curiae* brief of the National Association of Home Builders, the California Building Industry Association, the Building Industry Legal Defense Foundation, and the Home Builders Association of Northern California, the rules applied by California courts across a broad spectrum of land use law are uniquely contrary to settled constitutional decisions of this Court. If the Constitution is indeed to be the supreme law of the land, binding on "judges in every state" (U.S. Const., Art. VI, cl. 2), then it must apply in California, just as it does everywhere else.

II

MR. AND MRS. BUCKLEY WERE DENIED PROTECTIONS GUARANTEED BY THE 5TH AMENDMENT. THE COURT BELOW, APPLYING *LANDGATE* AND THE CALIFORNIA SUPREME COURT'S CLEAR MANDATE TO IGNORE THIS COURT'S 5TH AMENDMENT DECISIONS, HAS CREATED A TEXTBOOK CASE FOR THIS COURT'S REVIEW

The Buckleys' property was plainly taken by the Commission. Its actions prevented all use of the property, and its prevention of the Buckleys' landslide repair meant that the landslide eventually inflicted severe damage on the entire property. Even after the Court of Appeal held that the Commission lacked jurisdiction to regulate this property in any way, it denied any meaningful relief. There is no way that the Buckleys can be restored to the position they would have occupied without the Commission's actions. The landslide has permanently damaged the property. No development can even be attempted on the property without first designing a feasible remediation plan to mitigate that damage. Not to mention the years of lost use and the changes in the market.

The only meaningful relief after the ruinous impact of the Commission's actions would be formally transferring title to the property to the Commission (to legally acknowledge the fact that the property was *de facto* taken) and to compensate the Buckleys fully for the loss of their land. That is what the trial court did. (App., p. 59.) But the appellate courts took it away, leaving the Buckleys with an empty title to a damaged, unusable lot.

The actions of California's appellate courts are directly contrary to decisions of this Court like *First English* and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), as Mrs. Buckley explained in detail in her Petition (pp. 12-19). The Commission's response is based on either its denial of the real impact of its serial "STOP WORK" orders that prevented the Buckleys from even repairing a landslide that was destroying their property, or a rendering of the

"California party line" about the meaning of *First English*, which is at war with what this Court decided.

First, the Commission's factual denial is flawed. The Commission says that, according to both itself (Br. in Opp., pp. 5, 6) and the Court of Appeal (Br. in Opp., pp. 6, 8-9), the Buckleys were not denied the use of their land because the Commission wrongly asserted jurisdiction only over the rear half of their lot and they could therefore have built a home on the front portion. Wrong. The argument ignores each of these things: (1) the Commission's repeated orders to "STOP WORK" on the entire lot; (2) the County's order to repair the landslide on the rear of the lot, which the Commission would not permit; and, as the Court of Appeal concluded, (3) the practical necessity of repairing the landslide before building on any part of the lot, in order to protect the anticipated construction and to protect neighboring property.[3]

Second, the Commission's legal denial is equally flawed. The Commission faults Mrs. Buckley for failing to show how the delays she and her husband suffered at the Commission's hands "were not 'normal delays . . . ' and therefore not temporary takings under *First English*. . . . " (Br. in Opp., p. 5.) This Court itself explained in *First English* that litigation is not a "normal delay" in the planning process:

> "In this case the California Court of Appeal held that a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages *for the time before* it is finally determined that the regulation constitutes a 'taking' of his property. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution

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[3] Contrary to the Commission's assertion (Br. in Opp., p. 6), it is trial courts that determine facts in California, just like everywhere else. And this Court's decisions defer to such trial court fact-finding even when a state supreme court has reached different conclusions. (E.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 186-187 [1928].)

would *require compensation for that period*." (*First English*, 482 U.S. at 306-307; emphasis added.)

Under *First English*, litigational delay is part of the taking, not the planning process. Beyond that, the Commission's state of denial led it to assert that *Landgate* "is consistent with the teaching of *First English* that normal delays in the pursuit of legitimate regulatory goals do not constitute takings." (Br. in Opp., p. 9.) The audacity of that assertion is awesome. *Landgate* wholly undermines *First English*. It flatly contradicts *First English* by holding that the delay caused by litigation is always part of the "normal planning process" and therefore never compensable as a taking.

Contrary to the Commission's repeated assertion (Br. in Opp., pp. 6, 9, 10), this case is nothing at all like *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), where this Court said that the mere requirement of seeking a permit does not effect a taking. *Here, the Buckleys obtained all the permits they needed from the only agency with the jurisdiction to issue them: the County of Los Angeles.* The Coastal Commission never had the jurisdiction even to consider issuance of a permit. In *Riverside Bayview*, the regulatory agency *had* jurisdiction. The Commission now before this Court did not. But for the Commission's wrongful assertion of jurisdiction, the Buckleys would have quickly repaired the unstable ravine before the landslide developed, built their home (or sold the lot), and gotten on with their lives. (Compare *Bowles v. United States*, 31 Fed. Cl. 37, 49 [Fed. Cl. 1994] ["The burden of plaintiff is to show that 'but for' the . . . government's action they would have been able to realize their plans for the property allegedly taken."].)

Thus, the Buckleys find themselves in the position of (1) holding title to property that (2) a government agency has officially prevented them from using for any economically beneficial purpose for (3) a period that now approaches 10 years while (4) having neither jurisdiction nor any legal basis for attempting to regulate the property at all. Under *Lucas*, *First English*, and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Commission took the Buckleys' property and the 5th Amendment mandates compensation. The California

appellate courts, reinventing the law to evade this Court's holdings, overrode the trial court's considered factual judgment that a taking occurred (based on evidence that included a view of the site) and held that the Commission's "mistaken" assertion of jurisdiction *could not* result in a taking, regardless of the impact on the Buckleys.[4] This Court's intervention is needed to provide justice to the Buckleys and to re-establish the 5th Amendment's primacy in California.

III

THE COMMISSION UNDERESTIMATES ITS POWER AND TENACITY

In an intriguing *tour de force*, the Commission argues (Br. in Opp., pp. 6, 9) that it never prevented the Buckleys from making productive use of the front half of their lot and, in fact, ever since the trial court entered judgment, they were free to do as they pleased anywhere.

Nonsense. Throughout its existence, the Commission has shown itself to be a formidable adversary – one that fights tenaciously and wins more often than not. California property owners prudently think twice before crossing the Commission.

For example, in *Whaler's Village Club v. California Coastal Commn.*, 173 Cal.App.3d 240 (1985), beachfront homeowners took emergency action to build revetments to

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[4] The cases cited by the Commission at Br. in Opp., pp. 10-11 appear to be cases in which the regulating entity had jurisdiction to issue permits, but erred in the process. In any event, even if they fully supported the Commission here (which they don't), the Commission would have done no more than expose a conflict among state courts on this issue. In each of the following cases, the courts decided that – consistent with *First English* – compensation was mandated for the time consumed by litigation that established the illegality of the regulatory action: *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196 (Conn. 1998); *Woodland Manor III Associates v. Keeney*, 713 A.2d 806 (R.I. 1998); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994); *Alexander v. Town of Jupiter*, 640 So. 2d 79 (Fla. App. 1994).

protect their homes from destruction by unusual, on-rushing winter storms. Because of the exigence of timing, they did not first seek the Commission's permission. The Commission pursued them relentlessly, seeking to confiscate their land and impose heavy fines. And the California courts saw nothing wrong with that.

In *Grupe v. California Coastal Commn.*, 166 Cal.App.3d 148 (1985), the Commission demanded that the owner of a 15,250 square foot lot dedicate 10,000 square feet of it (a stunning 65%) to the public as a condition to building a home on the truncated remainder. And the California courts saw nothing wrong with that.

The Commission has fought landowners tenaciously regardless of the environmental soundness of their projects. Two well-known commentators (whose sympathies generally lay with the regulators) described the Commission's performance with respect to the Sea Ranch, a widely acclaimed, environmentally superior project in northern California, as "a sad story." The details of that story, and of how the Commission delayed the project for a decade, while the cost of everything rose dramatically and innocent lot purchasers were prevented from building and left with nothing to show for their decade of carrying costs, may be seen in Babcock & Siemon, *The Zoning Game Revisited* 235 (1985).

Thus, when the Commission's lawyer told the trial judge in the case at bench that the Commission intended to continue asserting jurisdiction over the Buckley property until it ran out of courts,[5] they were justifiably concerned. The Commission's suggestion that they should have taken the risk that they would prevail on appeal, against the likelihood that the Commission would come after them for those $5,000 per day fines if they lost, rings hollow. Indeed, it is absurd.

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[5] "The Commission has represented to the Court, through its counsel, that it will continue to claim its jurisdiction until all appeals are exhausted." (App., p. 50.)

CONCLUSION

California has been fooling this Court. In its most recent regulatory taking case, this Court opined that:

> "[e]ven the State of California, where this suit arose, now provides a facially adequate procedure for obtaining just compensation for temporary takings such as this one." (*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624, 1644 [1999].)

Unfortunately, that "facially adequate procedure" is no more than skin deep; there is no substance beneath the surface. In fact, California property owners have no more remedy for regulatory takings than they did before this Court decided *First English*. In the words of a recent commentary, the California Supreme Court has "*foreclosed completely* the ability of persons who have suffered regulatory takings to obtain just compensation." (Ramirez, *The California Supreme Court's Foreclosure of the Compensation Remedy for Takings Claimants: Assessing the Effect of Recent California Supreme Court Opinions*, 8 California Law & Policy Reporter 193 [April 1999].) As shown in the Petition, the California courts have established their own parochial world, in which this Court's decisions are paid lip service, while the rights proclaimed in them go unenforced.

It is time to restore California to the Union. Mrs. Buckley prays that certiorari be granted, that California's rules be brought in line with this Court's settled jurisprudence, and that the compensatory judgment entered by the trial court be reinstated.

Respectfully submitted,

MICHAEL M. BERGER*
BERGER & NORTON
Counsel for Petitioner
**Counsel of Record*